In The Senate of the United States

Sitting as a Court of Impeachment

In re:	)
Impeachment of G. Thomas Porteous, Jr.,	)
United States District Judge for the	)
Eastern District of Louisiana	)
	)

THE HOUSE'S CONSOLIDATED OPPOSITION TO
JUDGE G. THOMAS PORTEOUS, JR.'S MOTION TO COMPEL AND
MOTIONS FOR ASSISTANCE IN SECURING DISCOVERY

The House of Representatives ("House"), through its Managers and counsel, respectfully submits to the Committee this consolidated opposition and response to the three motions filed by Judge Porteous on June 27, 2010, related to pre-trial discovery in this case.[1]

I. OVERVIEW

The Senate Impeachment Trial Committee ("Committee") set a deadline for filing discovery motions in this matter of May 28, 2010. Nevertheless, a month after that deadline passed, Judge Porteous has filed three motions related to discovery matters. These motions should be denied on both procedural and substantive grounds.

Judge Porteous's Motion to Compel is nothing more than a rehash of document requests that he previously sought in his May 28, 2010 Motion for Discovery from the House Managers.

[1]This Opposition addresses: (1) Judge G. Thomas Porteous, Jr.'s Motion to Compel Inspection of Non-Privileged Materials Collected and Maintained by the House of Representatives and Requested for Expedited Consideration ("Motion to Compel"); (2) Judge G. Thomas Porteous, Jr.'s Motion for Assistance in Securing Discovery from the Department of Justice ("Motion for Assistance"); and (3) Judge G. Thomas Porteous, Jr.'s Motion for Assistance in Securing Discovery from the Metropolitan Crime Commission ("Motion for Assistance").

The Committee already carefully considered and ruled upon Judge Porteous's initial discovery motion, granting the motion in part, but denying it with respect to several overly broad and unreasonable requests. Apparently dissatisfied with the Committee's Disposition of Discovery Issues ("Disposition"), Judge Porteous in his Motion to Compel now repeats his requests, thereby seeking to have the Committee address an issue previously resolved. To this end, Judge Porteous has advanced nothing new to support the relief he seeks.

Judge Porteous has also filed two Motions for Assistance in Securing Discovery. The first seeks assistance in securing discovery from the Department of Justice ("DOJ"). The second seeks assistance in securing discovery from the Metropolitan Crime Commission ("MCC"). These requests are also without merit as a matter of both process and substance. As to the request related to the DOJ, Judge Porteous is asking the Senate to request that the DOJ and the FBI devote substantial resources to review and make available an immense collection of documents that cannot reasonably be seen as relevant to his defense. Moreover, it is foreseeable that this sweeping and untimely request, if granted, would be a prelude to further requests for continuances and litigation over process that is far-removed from the factual issues in this case. As to the request related to the MCC, it is apparent that Judge Porteous has not even reviewed the MCC materials that have been made available from the House, nor has Judge Porteous asked the House if it has produced all MCC documents. Instead, Judge Porteous has moved straight to a request for the Senate to chase down what are irrelevant and likely non-existent materials, again, with no showing of specificity or need.

As discussed in greater detail below, Judge Porteous's three discovery motions should be denied.

II. HOUSE'S OPPOSITION TO JUDGE PORTEOUS'S MOTION TO COMPEL

A. JUDGE PORTEOUS HAS ALLEGED NOTHING NEW TO WARRANT THE COMMITTEE REVISING ITS DISCOVERY DISPOSITION

There is nothing whatsoever in Judge Porteous's pleading which warrants the Committee revisiting its prior discovery Disposition. Indeed, substantial portions of the two pleadings are nearly identical. For example, Judge Porteous's Motion to Compel argues:

> What is particularly notable is that the Hastings impeachment followed an [sic] criminal indictment and a full trial in a federal court. Substantial evidence had been presented in the public record, and had been tested under the beyond-a reasonable-doubt standard. Thus, as in the impeachment of Judge Walter L. Nixon, Jr., the House and Senate were able to benefit from a detailed trial record. . . .
>
> In this case – where there is no prior indictment, no Court-ordered discovery, and no previous trial – the material already available to Judge Porteous is substantially less than that which was available to Judges Hastings and Nixon.[2]

This is the identical argument Judge Porteous made in his initial request for discovery, in which he sought limitless access to the House files:

> In each of the three prior cases involving a Rule XI committee, the House of Representatives returned Articles of Impeachment against a district judge after that judge had been indicted and tried at a criminal jury trial. . . . As a result, in those cases, by the time the issue of discovery arose before the Senate Impeachment Trial Committee, the parties had developed a record at a federal criminal trial and had been involved in extensive discovery prior to the return of the Articles of Impeachment. Thus, before

[2]Motion to Compel at 8-9.

> appearing before the Senate Impeachment Trial Committee each of these judges had the opportunity to cross-examine the government's witnesses, inquire in to the validity of documents presented as evidence against them, and call witness on his own behalf.[3]

Though Judge Porteous's Motion to Compel has cited to additional sources in connection with describing prior Impeachment proceedings, the essence of Judge Porteous's instant argument is no different from that made in his prior discovery motion.[4] Apparently, Judge Porteous concluded that the Committee did not understand his arguments the first time they were raised. That is not the case.

The Committee considered Judge Porteous's May 28, 2010 initial discovery motion, and in its Disposition dated June 9, 2010, it carefully addressed his discovery requests. There is simply no basis to allow Judge Porteous a "do-over" and permit him to re-argue points that have already been raised and decided simply because he is dissatisfied with this Committee's Disposition.

B. AS A MATTER OF SUBSTANCE, JUDGE PORTEOUS HAS ALLEGED NOTHING TO WARRANT THE COMMITTEE REVISING ITS DISCOVERY DISPOSITION

Furthermore, as a factual matter, Judge Porteous's Motion to Compel alleges nothing new that would justify the Committee to revisit its Disposition.

The House has set forth the background associated with discovery both in prior pleadings and in correspondence it has provided to the Committee, but the salient facts include the following:

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[3]Motion of Judge G. Thomas Porteous, Jr. For Discovery From the House Managers (May 28, 2010), at 1-2.

[4]Accordingly, the House relies upon and incorporates by reference its reply to that argument, set forth in Response by the House of Representatives to Motion of Judge G. Thomas Porteous, Jr. For Discovery from the House Managers (June 4, 2010), at 5-7.

1. The House provided Judge Porteous with an exhibit list on March 23, 2010 and an accompanying disc containing the exhibits. These materials account for nearly the entirety of the House's case, and Judge Porteous received them six months prior to trial. When these materials (which include witness testimony) are reviewed in conjunction with the highly detailed Impeachment Report, it is evident that Judge Porteous has been provided with what is close to a line-by-line preview of the House's case. There is no credible contention that Judge Porteous will be surprised at trial or that he does not know the evidence that he needs to address.[5]

2. On April 9, 2010, Judge Porteous's attorneys reviewed materials in the House's possession (document review 1). These included, generally, financial records of Judge Porteous and third parties (such as credit card records of some of the witnesses, and bank records of Judge Porteous's secretary, Rhonda Danos).[6] Although invited to do so, the attorneys made no request to copy any portion of these records.

3. On May 20, 2010, Judge Porteous's attorneys reviewed additional materials in the House's possession (document review 2). These consisted of complete and un-redacted sets of materials, from which only a subset had been marked as a trial exhibit. After their review, Judge Porteous's

[5]In that March 23 letter, the House also apprised Judge Porteous's counsel that it had additional materials obtained from third parties that it would make available for inspection and copying.

[6]A significant portion of these materials consisted of financial records that were the bases of various summary charts that were introduced at the Fifth Circuit Hearing. All of these underlying financial records were themselves made a part of the official record in the Fifth Circuit, pursuant to Judge Porteous's request.

attorneys requested a complete copy set of these materials. The House provided the materials the next day.

4. On May 26, Judge Porteous's attorneys reviewed additional materials identified by the House, generally consisting of Marcotte-related credit card and business records. Again the attorneys made no request to copy any of these records (document review 3).

5. The House identified what it believes to be a final collection of discoverable materials, and so informed both Messrs. Turley and Westling by way of a letter dated June 15, 2010. Also included was an updated exhibit list and updated disc of exhibits. The House also sent new counsel a letter dated June 22, 2010, making available the documents that were previously inspected (document reviews 1 and 3), and reiterating that a collection of documents referenced in the June 15 letter was still available for inspection and copying. On June 24, 2010, new counsel reviewed the materials that were previously part of document reviews 1 and 3 as well as the new materials (document review 4). As of June 27, 2010 – the date that Judge Porteous filed his Motion to Compel – Judge Porteous's attorneys had not sought copies of any of these materials that counsel reviewed on April 9, May 26, or June 24.[7]

[7]On June 30, 2010, Judge Porteous's attorneys sent an email to the House seeking to continue their review of documents in the House's possession and to make arrangements for copying.

The House has complied in good faith with the Committee's Disposition of Discovery Issues, and discovery is now complete.[8] Nothing in Judge Porteous's Motion to Compel provides any reason to conclude otherwise. Simply put, nothing has transpired since the issuance of the Committee's Disposition and Judge Porteous's filing of his Motion to Compel that provides any basis for the Committee to reconsider its Disposition or to support the conclusion that relevant materials covered by that Disposition have not been produced. Though Judge Porteous objects to the House making the determination of relevance associated with the production of documents,[9] that is precisely the burden that the Committee has required of the House, and the Committee has every reason to expect that the House has complied and will continue to comply with this obligation in a conscientious manner. It is also the burden placed upon counsel in civil and criminal litigation.[10] The House knows what is relevant to the four Articles of Impeachment, and Judge Porteous has never articulated any other factual theories that may constitute defenses that fall outside any reasonable understanding of the scope of those Articles.

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[8]The House recognizes the on-going nature of its discovery obligations, and if it locates or obtains additional discoverable materials, it will produce them to Judge Porteous promptly.

[9] "Only Judge Porteous's counsel can determine what materials in the Special Impeachment Counsel's possession may lead to evidence relevant to Judge Porteous's defense." Motion to Compel at 5.

[10]As a practical matter, it is nearly always the case that a party producing discovery makes commonsense decisions as to whether materials are discoverable under a "relevance" standard, and it is never the case that one party is provided access to all materials in the other party's possession solely on the claim that that the producing party cannot be trusted to determine what may be relevant to its case. No litigant is permitted access to the opposing party's warehouse of files so that it may pick and choose what materials it wants, on the argument that presumably, every document in the warehouse "touches upon" the case.

Indeed, Judge Porteous's discovery position should be evaluated in light of the fact that he has offered no competing version of facts, and he has been unable to articulate or explain exactly what it is that he is looking for to support his defense. It is apparent that his view of discovery is essentially that he be given the right to "fish" through document collections to see what he can come up with.[11] As but one example, Judge Porteous seeks materials that relate to "uncharged offenses" because such materials "may" lead to exculpatory information – a contention that is not only speculative in the extreme, but runs contrary to common sense. In any event, counsel for the House recognizes its obligation to turn over any exculpatory materials that come into its possession. In essence, Judge Porteous would have the Committee revisit the relevance standard and replace it with a standard that would permit him access to inspect all materials that "touch upon" the investigation – even materials that are irrelevant to the Articles. He equates "discovery" with unlimited access to the House's files. And, as discussed in the next Sections, Judge Porteous's two motions for Committee assistance likewise reflect little more than a desire to see what else may be out there in the possession of third parties. The Committee rightfully rejected these arguments as to the

[11]Judge Porteous in fact admitted before the Fifth Circuit Special Committee significant aspects of the factual allegations in two of the four Articles of Impeachment, such as his receipt of monies from Creely and Amato prior to taking the Federal Bench, his solicitation and receipt of cash from Amato while the Liljeberg case was pending, and his receipt of the payment of various expenses from Creely in connection with his May 1999 trip to Las Vegas (Article I). These are fully discussed in the Report. Judge Porteous has also admitted that several aspects of the bankruptcy petition were not true, though he has testified that these false statements were either by innocent mistake or otherwise without the intent to defraud (Article III). Notwithstanding the blanket denial in Judge Porteous's Answer to the Articles of Impeachment, numerous critical facts are likely to be uncontested.

scope of discovery, and Judge Porteous has provided no grounds to suggest that the Committee should revisit that decision.

Relying on his own views of discovery, Judge Porteous contends in his Motion that the House has "withheld" documents. If by the use of that term Judge Porteous seeks to imply that the House has failed to produce documents that the House should produce pursuant to the Committee's Disposition, then the House denies that allegation and again stresses that there is nothing in Judge Porteous's pleading that suggests otherwise. If Judge Porteous simply uses that term to suggest that the House has not produced irrelevant documents, then his use of the term "withheld" to describe that practice adds nothing to his claims.[12]

Further, it is difficult to take seriously Judge Porteous's attempts to litigate discovery when he has not made even a cursory effort to actually obtain documents that have been made available to him prior to filing his Motion to Compel. For example, the

[12]Indeed, Judge Porteous's reliance on loaded phrases and ad hominem attacks serves primarily to highlight the lack of real substance to his claims. For example, Judge Porteous asserts: "[the House's position is] gamesmanship . . . ;" "[the House's position is] particularly alarming . . . ;" "[implying the House is] skirmish[ing] for tactical advantage . . .; " "[implying the House] appear[s] to be making up for evidentiary shortcoming through tactical maneuvers that would deny Judge Porteous access to evidence and time necessary for a proper defense. Such tactics should be condemned in a standard criminal case, and should be anathema in a criminal trial." Even though this is decidedly not a criminal case, Judge Porteous's final comment in particular betrays ignorance of discovery in criminal cases, where witness statements are not ordered to be produced until after the witness testifies, where third party non-testifying witness statements are not typically produced or required to be produced (unless they are exculpatory), where the Government does not provide a published report describing its case, and where the Government's obligation to produce information "material to the preparation of the defense" has never been interpreted as permitting a defendant the right to rummage through the prosecutor's files because the prosecutor cannot be trusted to make such a determination himself and because, presumably, everything in the prosecutor's files "touches upon" the investigation. See Fed. R. Crim. Pro. 16. Discovery in this case is accordingly far broader – not narrower as Judge Porteous implies. Judge Porteous describes the law as he wishes it were, not as it is.

House marked as a trial exhibit only certain pages of the documents obtained from the Metropolitan Crime Commission (the "MCC"), but made available to Judge Porteous's counsel all documents that it obtained from the MCC. Significantly, Judge Porteous has not sought to copy the remainder of the MCC documents or even to inquire of the House whether Judge Porteous has been provided all materials from the MCC. Instead, Judge Porteous has filed a motion seeking the United States Senate to intervene with a public interest "good government" group in New Orleans.

Because Judge Porteous has failed to justify having the Committee take the extraordinary step of revisiting its Disposition, Judge Porteous's Motion to Compel should be denied.

III. THE HOUSE'S OPPOSITION TO JUDGE PORTEOUS'S MOTION FOR ASSISTANCE IN SECURING DISCOVERY FROM THE DEPARTMENT OF JUSTICE

It should be made clear at the outset that all relevant Wrinkled Robe materials the House has received from the Department of Justice have been given to or made available for inspection by Judge Porteous.

Judge Porteous has requested that the Senate Committee assist him in seeking eight categories of documents from the Department of Justice. The House objects to that request as it relates to the last six categories – generally involving the Wrinkled Robe investigation – because of the lack of any meaningful showing of relevance, the sheer breadth of the requests, the inexcusable delay in making them, and above all, the inevitable delay in these proceedings which would result from acceding to this request.[13]

[13]The first two categories of materials sought from the Department suffer from some of the same defects, though the requests are at least somewhat narrower in scope and have facial relevance to Article IV. As a practical matter, the House does not object if the Senate were to request the Department of Justice to search for additional materials in the

The Wrinkled Robe investigation involved the convictions of approximately 20 individuals for corruption at the Jefferson Parish, Louisiana courthouse, including two state court

judges and law enforcement personnel, arising from the provision and receipt of things of value from bail bondsman Louis Marcotte and his sister Lori Marcotte. The investigation commenced in or about 1999, with search warrants and wiretaps subsequently being executed. Because Judge Porteous had been on the Federal Bench since 1994, he was not a target in that investigation (though his relationship with the Marcottes was described in the FBI's affidavit in support of its request for wiretaps). There are thus relatively few materials relating to Judge Porteous that were obtained by the FBI in that investigation, and those that did relate to him – including some calendars from the Marcottes' bail bonds business that reflected meals with Judge Porteous in the mid to late 1990s and other evidence related to meals (such as credit card records) – were obtained by the House and have been made available to Judge Porteous.

The breadth of Judge Porteous's request related to the Wrinkled Robe materials is simply staggering. He seeks all material from that investigation that "relates to the setting, modifying, and/or splitting of bail bonds" and which relates to "Louis Marcotte, and Lois [sic] Marcotte." Each of these two categories would appear to encompass the

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nature of rough notes, for example, related to the FBI's interviews with Judge Porteous, Louis Marcotte and/or Robert Creely, in that Judge Porteous's statements are at issue, and Louis Marcotte and Robert Creely are likely witnesses. Those would be the only interviews that would conceivably be relevant. As a factual matter, the House has been advised that such notes do not exist. Accordingly, the House respectfully suggests that a letter to the DOJ and the FBI asking if such materials exist might be a better way of dealing with this issue. The House reiterates that it does not possess those materials. Furthermore, it is the House's understanding that it has been provided by the DOJ the complete background investigation, which the House, in turn, has provided to Judge Porteous.

entirety of the investigative materials. Another of the requests – for material that "relates to gifts, money, or other items of value received by judges, magistrates, or other judicial officers in the Jefferson Parish Courthouse" seeks review of massive amounts of evidence that can have no conceivable relevance to this Impeachment.

Granting Judge Porteous's request, in the absence of any coherent showing by Judge Porteous of potential relevance of the documents or a description with some precision of what exactly Judge Porteous is looking for, virtually guarantees procedural delay and opens the door to additional litigation. The access sought by Judge Porteous would almost certainly require that the DOJ and the FBI devote substantial resources – hundreds of hours – to the task of locating, organizing and reviewing materials prior to making them available to Judge Porteous. In particular, the FBI (as well as, in all likelihood, the Assistant United States Attorneys assigned to the case) would need to review materials to protect source information, wiretap information, grand jury information, and financial record information. The DOJ/FBI would not only need to search hundreds of boxes of hard copy records, but computerized and electronically stored materials as well. If DOJ were to agree to that task, and if the conduct of the trial were to await its completion and counsel's review, these proceedings would grind to a halt.

Moreover, as noted at the outset of this Section, Judge Porteous has failed to provide any compelling explanation as to why such documents are even relevant to his defense. Whether state judges were or were not prosecuted cannot possibly be relevant to whether Judge Porteous committed the acts alleged in Article II. Similarly, whether the usable evidence available to DOJ supporting the prosecution of other judges was greater

or lesser than the evidence against Judge Porteous cannot possibly be relevant to whether Judge Porteous committed the acts alleged in Article II. This Impeachment is thus quite unlike the Hastings Impeachment. In that case, Judge Hastings sought the FBI to produce documents related to its investigation of Judge Hastings. In this case, Judge Porteous explicitly seeks that the FBI produce records that are nearly entirely related to the investigation of third parties. What Judge Porteous seeks is little more than the proverbial "fishing" expedition, and the Senate should not bait the hook for that effort.

Furthermore, Judge Porteous's Motion for Assistance marks the first time that the House has been made aware of Judge Porteous's desire to review documents in the FBI's possession. We note that in Judge Porteous's discovery letter of May 6, 2010, counsel did not seek from the House its assistance in obtaining access to the massive collection of Wrinkled Robe documents in the DOJ's or FBI's possession or otherwise inquire as to those documents. In the same vein, Judge Porteous's discovery motion filed on May 28, 2010 did not seek access to documents in the DOJ's or FBI's possession, nor did it seek the Committee's assistance in obtaining those documents. Only on June 27, 2001, one month after the filing deadline for discovery motions, did Judge Porteous for the first time state that he needed the "immediate assistance of the Senate in procuring these materials" – the existence of which has been known to Judge Porteous for years.[14] If these documents were truly important and relevant, Judge Porteous would have sought access to them months ago. Instead, the untimely and sweeping nature of the request, made late in the day, unsupported by any reasonable showing of relevance or specificity,

[14]The mere substitution of counsel does not justify or explain Judge Porteous's decision at this stage of the proceedings – three months subsequent to the House making its first document production – for the defense.

on the heels of prior requests for continuance and delays, only underscores the request's lack of merit. Accordingly, Judge Porteous's request for Committee assistance should be denied.

IV. THE HOUSE'S OPPOSITION TO JUDGE PORTEOUS'S MOTION FOR ASSISTANCE IN SECURING DISCOVERY FROM THE METROPOLITAN CRIME COMMISSION

In 1994, the Metropolitan Crime Commission of New Orleans, responding to a complaint, investigated Judge Porteous's actions in setting aside the conviction of a Marcotte employee, Aubrey Wallace, in the last days of Judge Porteous's tenure on the state bench. Ultimately, the MCC concluded that the judicial action was improper but that there was nothing it could do because Judge Porteous was by that time a Federal Judge.

The MCC provided a portion of its investigative files to the Department of Justice, and the Department has since provided those materials to the House. Separately, in 2009, the MCC provided directly to the House what the House believes to be the MCC's complete file. The House has marked a portion of the MCC documents as exhibits for potential use at the Impeachment trial, and has made the remainder of the MCC documents available for Judge Porteous's defense team to review. Significantly, as of June 27, 2010 – the date Judge Porteous filed his Motion for Assistance – he had not sought to copy those MCC documents which have been made available to him.

Even putting aside that the House believes it to be unlikely that the MCC actually possesses other documents related to Judge Porteous, the House urges the Committee to reject Judge Porteous's request. As with his request for Wrinkled Robe materials, Judge Porteous does not seek to invoke the Committee's assistance to request that the MCC

provide any particular documents to support a particular evidentiary or factual theory. Rather, Judge Porteous seeks that the Committee help him determine whether the MCC has any additional documents – regardless of relevance – and if so, to make them available. This is precisely the sort of "fishing" expedition that is disapproved in the discovery process, and Judge Porteous has made no showing that would justify the Committee's intervention, particularly where he has not yet obtained or looked at the MCC documents which have been made available.

WHEREFORE, the House requests Judge Porteous's Motion to Compel and Motions for Assistance be denied.

Respectfully submitted,

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